

## HOUSE BILL NO. 33

INTRODUCED BY C. YOUNKIN

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING A SHORT-TERM ~~SALE OR~~ LEASE OF A WATER RIGHT FOR ROAD CONSTRUCTION OR DUST ABATEMENT WITHOUT APPROVAL BY THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; AMENDING SECTIONS 85-2-122, 85-2-402, 85-2-407, AND 85-2-419, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION.** **Section 1. Short-term ~~sale or~~ lease of appropriation right.** (1) An appropriator may ~~sell or~~ lease for a term not to exceed 90 days all or part of an appropriation right for road construction or dust abatement without the prior approval of the department, subject to the requirements of this section. The ~~sale or~~ lease agreement must include the following information:

(a) the name and address of the ~~buyer or~~ lessee;

(b) the name of the owner of the appropriation right;

(c) the number of the appropriation right;

(d) the purpose of use of water for which the ~~sale or~~ lease is being made;

(e) the source of water to be appropriated;

(f) the starting and ending date of the proposed use of water;

~~(g) the diversion flow rate and volume of water to be used during the period of use;~~

~~(h)~~(G) the proposed point of diversion;

~~(i)~~(H) the proposed place of use; ~~and~~

(I) THE DIVERSION FLOW RATE AND VOLUME OF WATER TO BE USED DURING THE PERIOD OF USE; AND

(j) a description of how the existing use of water will be reduced to accommodate the temporary change of use of the appropriation right, including the number and location of acres to be removed from irrigation, if applicable.

(2) A short-term ~~sale or~~ lease of an appropriation right under this section may not exceed ~~40,000~~ 60,000 gallons a day or the amount of the appropriation right, whichever is less. ANY COMBINATION OF

1 SHORT-TERM LEASES CANNOT EXCEED 120,000 GALLONS A DAY FOR ONE PROJECT.

2 (3) The following information must be submitted to the department at least ~~10~~ 2 days prior to the  
3 ~~appropriation~~ USE of water by a ~~buyer or~~ lessee under this section:

4 (a) a copy of the publication notice OR COPIES OF THE INDIVIDUAL NOTICE required under subsection  
5 (4); ~~and~~

6 (b) a copy of the ~~sale or~~ lease agreement; AND

7 (C) FOR A COMBINATION OF SHORT-TERM LEASES GREATER THAN 60,000 GALLONS A DAY FOR ONE PROJECT,  
8 AN ANALYSIS BY THE LESSEE OF ANY POTENTIAL ADVERSE EFFECTS AND A DESCRIPTION OF PLANNED ACTIONS TO MITIGATE  
9 ANY POTENTIAL ADVERSE EFFECTS TO APPROPRIATORS IN THE AREA OF THE PROPOSED POINT OF DIVERSION.

10 (4) The ~~buyer or~~ lessee of an appropriation right under this section shall, 30 DAYS PRIOR TO THE USE  
11 OF THE WATER, publish a notice of the proposed use of water once in a newspaper of general circulation in  
12 the area of the diversion ~~30 days prior to the appropriation USE of the water~~ OR SHALL MAIL INDIVIDUAL NOTICE  
13 TO POTENTIALLY AFFECTED APPROPRIATORS IN THE AREA OF THE PROPOSED POINT OF DIVERSION. The PUBLISHED NOTICE  
14 OR THE INDIVIDUAL notice must contain the information listed in subsections (1)(a) through (1)(j) AND (3)(C).

15 (5) (A) THE OWNER OF A WATER RIGHT, WHETHER THE RIGHT IS PRIOR OR SUBSEQUENT IN PRIORITY TO THE  
16 SHORT-TERM LEASE ACQUIRED BY A PERSON UNDER THIS SECTION, WHO CANNOT SATISFY IN FULL THE OWNER'S RIGHT  
17 DURING THE TIME THAT THE SHORT-TERM LESSEE IS DIVERTING WATER MAY MAKE A COMPLAINT TO THE DEPARTMENT AND  
18 CAUSE THE SHORT-TERM LESSEE'S DIVERSION TO BE DISCONTINUED.

19 (B) THE DIVERSION IS DISCONTINUED UNTIL THE OWNER'S RIGHT IS SATISFIED OR UNTIL THE LESSEE ESTABLISHES  
20 TO THE DEPARTMENT THAT THE DISCONTINUANCE HAS HAD NO EFFECT ON THE OWNER'S WATER RIGHT. UPON  
21 ESTABLISHMENT THAT DISCONTINUANCE HAS NOT HAD AN EFFECT, THE DEPARTMENT SHALL ENTER AN ORDER ALLOWING  
22 THE DIVERSION TO CONTINUE.

23 (6) IF A PERSON PURPOSELY, WITH MALICIOUS INTENT, CAUSES THE DISCONTINUANCE OF A SHORT-TERM  
24 DIVERSION THROUGH THE COMPLAINT PROCESS PROVIDED IN SUBSECTION (5)(A) AND THE COMPLAINT IS FOUND TO BE  
25 INVALID AND FRIVOLOUS, THE PERSON IS, UPON CONVICTION, GUILTY OF A MISDEMEANOR AND SHALL BE FINED IN AN  
26 AMOUNT NOT TO EXCEED \$500.

27 ~~(5)(7)~~ This section does not limit the remedies available to a ~~prior~~ AN appropriator to enjoin or to  
28 seek damages from a person appropriating water under this section.

29 (8) A CIVIL ACTION INSTITUTED TO ENJOIN OR SEEK DAMAGES FROM A PERSON APPROPRIATING WATER  
30 PURSUANT TO THIS SECTION MUST BE COMMENCED AGAINST THE LESSEE. THE LESSOR IS NOT A NECESSARY PARTY TO

1 A CIVIL ACTION. THE LESSEE HAS THE BURDEN OF ESTABLISHING THAT THE LESSEE'S USE DOES NOT HAVE AN ADVERSE  
2 EFFECT ON A PRIOR APPROPRIATOR OF WATER.

3

4 **SECTION 2.** SECTION 85-2-122, MCA, IS AMENDED TO READ:

5 **"85-2-122. Penalties.** (1) A person who violates or refuses or neglects to comply with the  
6 provisions of this chapter, any order of the department, or any rule of the department is guilty of a  
7 misdemeanor.

8 (2) ~~A~~ Except as provided in [section 1(6)], a person who violates or refuses or neglects to comply  
9 with the provisions of 85-2-114, any order of the department, or any rule of the department is subject to  
10 a civil penalty not to exceed \$1,000 per violation. Each day of violation constitutes a separate violation.

11 (3) Fines collected by the department or a district court under subsection (2) must be deposited  
12 in the account established in 85-2-318 for use by the department in the enforcement of 85-2-114."

13

14 **Section 3.** Section 85-2-402, MCA, is amended to read:

15 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject  
16 to the provisions of this section in an existing water right, a permit, or a state water reservation is  
17 recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
18 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
19 of other rights in the source of supply pursuant to this chapter. ~~An~~ Except as provided in [section 1], an  
20 appropriator may not make a change in an appropriation right except, as permitted under this section, by  
21 applying for and receiving without the approval of the department or, if applicable, of the legislature. An  
22 applicant shall submit a correct and complete application.

23 (2) Except as provided in subsections (4) through (6), the department shall approve a change in  
24 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are  
25 met:

26 (a) The proposed change in appropriation right will not adversely affect the use of the existing  
27 water rights of other persons or other perfected or planned uses or developments for which a permit or  
28 certificate has been issued or for which a state water reservation has been issued under part 3.

29 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for  
30 instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439

1 when authorization does not require appropriation works, the proposed means of diversion, construction,  
2 and operation of the appropriation works are adequate.

3 (c) The proposed use of water is a beneficial use.

4 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization  
5 pursuant to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, the applicant has a  
6 possessory interest, or the written consent of the person with the possessory interest, in the property  
7 where the water is to be put to beneficial use.

8 (e) If the change in appropriation right involves salvaged water, the proposed water-saving  
9 methods will salvage at least the amount of water asserted by the applicant.

10 (f) The water quality of an appropriator will not be adversely affected.

11 (g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in  
12 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

13 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been  
14 met only if a valid objection is filed. A valid objection must contain substantial credible information  
15 establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as  
16 applicable, may not be met.

17 (4) The department may not approve a change in purpose of use or place of use of an  
18 appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water  
19 unless the appropriator proves by a preponderance of evidence that:

20 (a) the criteria in subsection (2) are met; and

21 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a  
22 consideration of:

23 (i) the existing demands on the state water supply, as well as projected demands for water for  
24 future beneficial purposes, including municipal water supplies, irrigation systems, and minimum  
25 streamflows for the protection of existing water rights and aquatic life;

26 (ii) the benefits to the applicant and the state;

27 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

28 (iv) the availability and feasibility of using low-quality water for the purpose for which application  
29 has been made;

30 (v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that the proposed change might adversely affect the rights of other persons.

(8) The department or the legislature, if applicable, may approve a change subject to the terms, conditions, restrictions, and limitations ~~as~~ that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.

(10) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

1 (12) A person holding an issued permit or change approval that has not been perfected may change  
2 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change  
3 pursuant to this section.

4 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,  
5 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an  
6 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,  
7 personally or through an agent, officer, or employee, attempt to change an appropriation right except in  
8 accordance with this section.

9 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
10 30, 2005--sec. 6, Ch. 322, L. 1995; sec. 14, Ch. 487, L. 1995.)

11 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a change  
12 subject to the provisions of this section in an existing water right, a permit, or a state water reservation  
13 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
14 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
15 of other rights in the source of supply pursuant to this chapter. ~~An~~ Except as provided in [section 1], an  
16 appropriator may not make a change in an appropriation right except, as permitted under this section, by  
17 applying for and receiving without the approval of the department or, if applicable, of the legislature. An  
18 applicant shall submit a correct and complete application.

19 (2) Except as provided in subsections (4) through (6), the department shall approve a change in  
20 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are  
21 met:

22 (a) The proposed change in appropriation right will not adversely affect the use of the existing  
23 water rights of other persons or other perfected or planned uses or developments for which a permit or  
24 certificate has been issued or for which a state water reservation has been issued under part 3.

25 (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation  
26 works, the proposed means of diversion, construction, and operation of the appropriation works are  
27 adequate.

28 (c) The proposed use of water is a beneficial use.

29 (d) The applicant has a possessory interest, or the written consent of the person with the  
30 possessory interest, in the property where the water is to be put to beneficial use.

1 (e) If the change in appropriation right involves salvaged water, the proposed water-saving  
2 methods will salvage at least the amount of water asserted by the applicant.

3 (f) The water quality of an appropriator will not be adversely affected.

4 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in  
5 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

6 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been  
7 met only if a valid objection is filed. A valid objection must contain substantial credible information  
8 establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as  
9 applicable, may not be met.

10 (4) The department may not approve a change in purpose of use or place of use of an  
11 appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water  
12 unless the appropriator proves by a preponderance of evidence that:

13 (a) the criteria in subsection (2) are met; and

14 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a  
15 consideration of:

16 (i) the existing demands on the state water supply, as well as projected demands for water for  
17 future beneficial purposes, including municipal water supplies, irrigation systems, and minimum  
18 streamflows for the protection of existing water rights and aquatic life;

19 (ii) the benefits to the applicant and the state;

20 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

21 (iv) the availability and feasibility of using low-quality water for the purpose for which application  
22 has been made;

23 (v) the effects on private property rights by any creation of or contribution to saline seep; and

24 (vi) the probable significant adverse environmental impacts of the proposed use of water as  
25 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

26 (5) The department may not approve a change in purpose of use or place of use for a diversion  
27 that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water  
28 being consumed unless:

29 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria  
30 in subsections (2) and (4) are met; and



(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use

1 outside the state, the applicant shall submit to and comply with the laws of the state of Montana  
2 governing the appropriation and use of water.

3 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of  
4 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the  
5 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
6 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and  
7 may hold one or more hearings upon any other proposed change if it determines that the proposed change  
8 might adversely affect the rights of other persons.

9 (8) The department or the legislature, if applicable, may approve a change subject to the terms,  
10 conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section,  
11 including limitations on the time for completion of the change. The department may extend time limits  
12 specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

13 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the  
14 appropriator shall notify the department that the appropriation has been completed. The notification must  
15 contain a certified statement by a person with experience in the design, construction, or operation of  
16 appropriation works describing how the appropriation was completed.

17 (10) If a change is not completed as approved by the department or legislature or if the terms,  
18 conditions, restrictions, and limitations of the change approval are not complied with, the department may,  
19 after notice and opportunity for hearing, require the appropriator to show cause why the change approval  
20 should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may  
21 modify or revoke the change approval.

22 (11) The original of a change approval issued by the department must be sent to the applicant, and  
23 a duplicate must be kept in the office of the department in Helena.

24 (12) A person holding an issued permit or change approval that has not been perfected may change  
25 the place of diversion, place of use, purpose of use, or place of storage by filing an application for change  
26 pursuant to this section.

27 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,  
28 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an  
29 unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,  
30 personally or through an agent, officer, or employee, attempt to change an appropriation right except in

1 accordance with this section.

2 (14) The department may adopt rules to implement the provisions of this section. (Terminates June  
3 30, 2009--sec. 9, Ch. 123, L. 1999.)

4 **85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change  
5 subject to the provisions of this section in an existing water right, a permit, or a state water reservation  
6 is recognized and confirmed. In a change proceeding under this section, there is no presumption that an  
7 applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication  
8 of other rights in the source of supply pursuant to this chapter. ~~An~~ Except as provided in [section 1], an  
9 appropriator may not make a change in an appropriation right ~~except, as permitted under this section, by~~  
10 ~~applying for and receiving~~ without the approval of the department or, if applicable, of the legislature. An  
11 applicant shall submit a correct and complete application.

12 (2) Except as provided in subsections (4) through (6), the department shall approve a change in  
13 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are  
14 met:

15 (a) The proposed change in appropriation right will not adversely affect the use of the existing  
16 water rights of other persons or other perfected or planned uses or developments for which a permit or  
17 certificate has been issued or for which a state water reservation has been issued under part 3.

18 (b) The proposed means of diversion, construction, and operation of the appropriation works are  
19 adequate.

20 (c) The proposed use of water is a beneficial use.

21 (d) The applicant has a possessory interest, or the written consent of the person with the  
22 possessory interest, in the property where the water is to be put to beneficial use.

23 (e) If the change in appropriation right involves salvaged water, the proposed water-saving  
24 methods will salvage at least the amount of water asserted by the applicant.

25 (f) The water quality of an appropriator will not be adversely affected.

26 (g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in  
27 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

28 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been  
29 met only if a valid objection is filed. A valid objection must contain substantial credible information  
30 establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as

1 applicable, may not be met.

2 (4) The department may not approve a change in purpose of use or place of use of an  
3 appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water  
4 unless the appropriator proves by a preponderance of evidence that:

5 (a) the criteria in subsection (2) are met; and

6 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a  
7 consideration of:

8 (i) the existing demands on the state water supply, as well as projected demands for water for  
9 future beneficial purposes, including municipal water supplies, irrigation systems, and minimum  
10 streamflows for the protection of existing water rights and aquatic life;

11 (ii) the benefits to the applicant and the state;

12 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

13 (iv) the availability and feasibility of using low-quality water for the purpose for which application  
14 has been made;

15 (v) the effects on private property rights by any creation of or contribution to saline seep; and

16 (vi) the probable significant adverse environmental impacts of the proposed use of water as  
17 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

18 (5) The department may not approve a change in purpose of use or place of use for a diversion  
19 that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water  
20 being consumed unless:

21 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria  
22 in subsections (2) and (4) are met; and

23 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the  
24 department then petitions the legislature and the legislature affirms the decision of the department after  
25 one or more public hearings.

26 (6) The state of Montana has long recognized the importance of conserving its public waters and  
27 the necessity to maintain adequate water supplies for the state's water requirements, including  
28 requirements for reserved water rights held by the United States for federal reserved lands and in trust for  
29 the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that,  
30 under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict

1 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met  
2 before out-of-state use may occur:

3 (a) The department and, if applicable, the legislature may not approve a change in appropriation  
4 right for the withdrawal and transportation of appropriated water for use outside the state unless the  
5 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one  
6 or more public hearings that:

7 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures  
8 of subsection (2) or (4) are met;

9 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

10 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the  
11 citizens of Montana.

12 (b) In determining whether the appropriator has proved by clear and convincing evidence that the  
13 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the  
14 legislature shall consider the following factors:

15 (i) whether there are present or projected water shortages within the state of Montana;

16 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly  
17 be transported to alleviate water shortages within the state of Montana;

18 (iii) the supply and sources of water available to the applicant in the state where the applicant  
19 intends to use the water; and

20 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use  
21 the water.

22 (c) When applying for a change in appropriation right to withdraw and transport water for use  
23 outside the state, the applicant shall submit to and comply with the laws of the state of Montana  
24 governing the appropriation and use of water.

25 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of  
26 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the  
27 proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
28 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and  
29 may hold one or more hearings upon any other proposed change if it determines that the proposed change  
30 might adversely affect the rights of other persons.

(8) The department or the legislature, if applicable, may approve a change subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.

(10) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(12) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

(14) The department may adopt rules to implement the provisions of this section."

**Section 4.** Section 85-2-407, MCA, is amended to read:

**"85-2-407. Temporary changes in appropriation right.** (1) ~~An~~ Except as provided in [section 1], an appropriator may not make a temporary change in appropriation right for the appropriator's use or another's use except with department approval in accordance with 85-2-402 and this section.

(2) A temporary change in appropriation right may be approved for a period not to exceed 10

1 years. A temporary change in appropriation right may be approved for consecutive or intermittent use.

2 (3) An authorization for a temporary change in appropriation right may be renewed by the  
3 department for a period not to exceed 10 years. Renewal of an authorization for a temporary change in  
4 appropriation right requires application to the department by the appropriator. Upon application, the  
5 department shall notify other appropriators potentially affected by the renewal and shall allow 30 days for  
6 submission of new evidence of adverse effects to other water rights. A temporary change authorization  
7 may not be renewed by the department if it determines that the right of an appropriator, other than an  
8 appropriator described in subsection (7), is adversely affected.

9 (4) (a) During the term of the original temporary change authorization, the department may modify  
10 or revoke its authorization for a temporary change if it determines that the right of an appropriator, other  
11 than an appropriator described in subsection (7), is adversely affected.

12 (b) An appropriator, other than an appropriator identified in subsection (7), may object:

13 (i) during the initial temporary change application process;

14 (ii) during the temporary change renewal process; and

15 (iii) once during the term of the temporary change permit.

16 (5) The priority of appropriation for a temporary change in appropriation right is the same as the  
17 priority of appropriation of the right that is temporarily changed.

18 (6) Neither a change in appropriation right nor any other authorization right is required for reversion  
19 of the appropriation right to the permanent purpose, place of use, point of diversion, or place of storage  
20 after the period for which a temporary change was authorized expires.

21 (7) A person issued a water use permit with a priority of appropriation after the date of filing of  
22 an application for a temporary change in appropriation right under this section may not object to the  
23 exercise of the temporary change according to its terms, the renewal of the authorization for the  
24 temporary change, or the reversion of the appropriation right to its permanent purpose, place of use, point  
25 of diversion, or place of storage. Persons described in this subsection must be notified of the existence  
26 of any temporary change authorizations from the same source of supply.

27 (8) If a water right for which a temporary change has been approved is transferred as an  
28 appurtenance of real property, the temporary change remains in effect unless another change in  
29 appropriation right is authorized by the department."

30

**Section 5.** Section 85-2-419, MCA, is amended to read:

**"85-2-419. Salvaged water.** It is the declared policy of the state in 85-1-101 to encourage the conservation and full use of water. Consistent with this policy, holders of appropriation rights who salvage water may retain the right to the salvaged water for beneficial use. ~~Any~~ Except for a short-term sale or lease pursuant to [section 1], any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right must be approved by the department as a change in appropriation right in accordance with 85-2-402. Sale of the right to salvaged water must also be in accordance with 85-2-403 ~~or [section 1],~~ and the lease of the right to salvaged water ~~for instream flow purposes~~ must be in accordance with 85-2-408, [section 1], 85-2-436, or 85-2-439."

NEW SECTION. **Section 6. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to [section 1].

**NEW SECTION. Section 7. Effective date.** [This act] is effective on passage and approval.

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